University of Richmond Law Review

Volume 8 | Issue 2 Article 21

1974

Tort Law- Emotional Disturbances and Resulting Physical Injuries Occasioned By Negligence

Tort Law—EMOTIONAL DISTURBANCES AND RESULTING PHYSICAL INJURIES OCCASIONED BY NEGLIGENCE—*Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973).

The early decisions involving negligently inflicted emotional distress and resulting physical injuries generally held that a contemporaneous physical impact was a prerequisite to a right of recovery.[1] This requirement, commonly referred to as the "impact rule,"[2] has today been rejected or abrogated in most American jurisdictions.[3] The status of this rule in Virginia has been unclear since the decision of *Bowles v. May*[4] because of conflicting

1. Both England and America adopted the "impact rule" at approximately the same time in the landmark decisions of Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (Can. 1888) and Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *Victorian* announced three basic reasons for their holding. First, damages unaccompanied by actual physical injury cannot be considered as a natural result of negligence. Secondly, recovery in such cases would open the field for imaginary claims. Finally, there was no precedent of a similar action having been maintained. *Mitchell* based their decision on the following reasons. First, since recovery for emotional disturbance is not permitted, resulting physical injuries do not afford a basis for recovery. Secondly, recovery would precipitate a flood of litigation. Finally, the door would be opened to feigned claims. Despite the fact that England abandoned the rule thirteen years later in Dulieu v. White & Sons, [1901] 2 K.B. 669, the "impact rule" had gained favor in the majority of American jurisdictions. *See* Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kalen v. Terre Haute & I.R.R., 18 Ind. App. 202, 47 N.E. 694 (1897); Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899); Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 A. 561 (1900). *Contra*, Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

2. Hughes v. Moore, 214 Va. 27, 31, 32, 33, 197 S.E.2d 214, 217, 218 (1973).

3. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 331 n.64 (4th ed. 1971), listing the jurisdictions which still require a contemporaneous physical impact:

> [T]he following jurisdictions so hold: Arkansas, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Ohio, Virginia (doubtful), Washington. Florida allows recovery without impact where the defendant's conduct is wanton or malicious, but not otherwise.

But see Stewart v. Gilliam, 271 So. 2d 466 (Fla. Dist. Ct. App. 1972) (removing Florida); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970) (removing Michigan); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973) (removing Virginia). It appears that only nine jurisdictions still require impact, and only one of the remaining nine have considered the rule since 1929. Comment, *Injuries from Fright Without Contact*, 15 CLEV.-MAR. L. REV. 331, 337 (1966).

4. 159 Va. 419, 166 S.E. 550 (1932). In this case plaintiff was denied recovery when she suffered a stroke of paralysis and speech impediments allegedly occasioned by defendant's threats to sue and accusation that plaintiff had made criminal libelous statements and that he intended to see that she went to jail. The confusion apparently results from the language of the court and their disposition of the case.

> [I]n Virginia . . . there can be no recovery for mental anguish and suffering resulting from negligence unaccompanied by contemporaneous physical injuries . . . . *Id.* at 433, 166 S.E. at 555.

Later the opinion stated:

> While the possible success of unrighteous or groundless actions should not bar recovery

interpretations.[5]

In *Hughes v. Moore*[6] the Virginia Supreme Court resolved this conflict. Action was brought to recover for physical disorders allegedly sustained as a direct consequence of fright and shock,[7] occasioned when defendant's automobile struck plaintiff's porch. Plaintiff was standing in a doorway between her living room and kitchen when she heard the crash and saw headlights shining through her front window. She became very nervous and was unable to breast-feed her three-month-old baby due to her "diminishing breasts,"[8] and her menstrual period started.[9]

Affirming a jury verdict for the plaintiff, the court ruled that a right of recovery exists for "physical injuries" sustained as a natural result of fright and shock, proximately caused by the defendant's negligent conduct.[10] Certain limitations were imposed upon this holding. First, recovery is limited to cases in which a person of ordinary sensibilities would have been affected under the circumstances, unless the defendant had specific knowledge of a plaintiff's peculiar sensibilities.[11] Secondly, this holding is not

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in a meritorious case, nevertheless, because of the fact that fright or mental shock may be so easily feigned without detection, the court should allow no recovery in a doubtful case. *Id.* at 438, 166 S.E. at 557.

5. Penick v. Mirro, 189 F. Supp. 947, 949-50 (E.D. Va. 1960), interpreted *Bowles* as permitting recovery notwithstanding the absence of a physical impact and concluded that recovery in *Bowles* was denied on the basis of insufficiency of the evidence. *But see* Ferrell v. Chesapeake & O. Ry. Emp. Hosp. Ass'n, 336 F. Supp. 833, 835 (W.D. Va. 1971); Soldinger v. United States, 247 F. Supp. 559, 560 (E.D. Va. 1965).

6. 214 Va. 27, 197 S.E.2d 214 (1973) (Harrison, J., dissenting).

7. *Id.* at 29, 197 S.E.2d at 216. Dr. Nelson, a psychiatrist, was "of the opinion that there was a 'causal connection' between the automobile striking plaintiff's home and her emotional and physical condition."

8. *Id.* at 28-29, 197 S.E.2d at 215-16. Dr. Gabriel, plaintiff's family physician, prescribed hormones, but apparently they were ineffective since plaintiff testified that some two years later her breasts were smaller than their normal size.

9. *Id.* at 28-29, 197 S.E.2d at 215. "Her menstrual period had begun, which is not normal for a mother during the period of nursing her child, and the flow was excessive."

10. *Id.* at 34, 197 S.E.2d at 219.

> We hold, . . . that where the claim is for emotional disturbance *and* physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence.

11. *Id.* at 34, 197 S.E.2d at 219. This is the prevailing view in America. *See* 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* § 27 & n.18 (1968). Several jurisdictions, however, have followed the RESTATEMENT (SECOND) OF TORTS § 461 (1965):

> The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct. *Id.*

intended to permit recovery in cases involving the witnessing of negligently inflicted injuries to third persons.[12]

The traditional arguments advanced by the proponents of the "impact rule" were rejected by the court in the following manner. Medical science has minimized the difficulty of finding a causal relationship between the injury sustained and the fright experienced.[13] Simply because damages are speculative and will possibly open the door to fictitious claims should not prohibit those with legitimate claims from proving their case.[14] The fears of increased litigation should not cause the courts to shirk their responsibilities,[15] and it has not been established that these fears have materialized

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Accord, DiMare v. Cresci, 58 Cal.2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962); Colla v. Mandella, 1 Wis.2d 594, 85 N.W.2d 345 (1957).

12. Hughes v. Moore, 214 Va. 27, 34, 197 S.E.2d 214, 219-20 (1973). This is the position taken by the great weight of authority. 38 AM. JUR. 2d *Fright, Shock, and Mental Disturbance* § 36 & n.16 (1968). California has dissented in this area and has permitted recovery to a mother who witnessed the death of her child, notwithstanding the fact that she was in a complete zone of safety, on the basis that the resulting injuries were reasonably foreseeable by the defendant. Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). This approach has not been followed in other jurisdictions and was expressly rejected in Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968); and Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

> It seems sufficiently obvious that the shock of a mother at danger or harm to her child may be both a real and serious injury. All ordinary human feelings are in favor of her action against the negligent defendant. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 334 (4th ed. 1971).

13. Hughes v. Moore, 214 Va. 27, 33, 197 S.E.2d 214, 218. *Accord*, Purcell v. St. Paul Ry., 48 Minn. 134, 50 N.W. 1034 (1892); Hanford v. Omaha & C.B. St. Ry., 113 Neb. 423, 203 N.W. 643 (1925); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 212-26 (1944). The argument that physical consequences are too remote was cleverly countered in Dulieu v. White & Sons, [1901] 2 K.B. 669, where it was noted that remoteness as applied in tort law is not a matter of time. If this were the case then a person who administered a slow acting poison would not have proximately caused the death, because the victim may not die for several hours. *Id.* at 677-78.

14. Hughes v. Moore, 214 Va. 27, 33, 197 S.E.2d 214, 219 (1973). The fear of vexatious suits and fictitious claims is considered to be the most valid objection to recovery:

> Whatever justification there may be rests in the courts' fear that unscrupulous lawyers with the aid of equally unscrupulous doctors may obtain from sympathetic juries verdicts upon purely fabricated evidence. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 733 (1937).

15. Hughes v. Moore, 214 Va. 27, 33, 197 S.E.2d 214, 219 (1973). *See* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939):

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do. *Id.* at 877.

Contra, Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88, 89 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354, 355 (1896).

in those jurisdictions which do not require impact.[16] The weight of authority supported the court's conclusion that the reasons for the existence of the "impact rule" are no longer logical,[17] and research revealed that since 1929 every jurisdiction that has considered the rule, except one,[18] has either rejected or abrogated the "impact rule."[19]

Apparently relying on two of the traditional arguments,Justice Harrison in his dissent was of the opinion that the *Hughes* case demonstrated the wisdom of the "impact rule," and that Virginia should neither modify nor abrogate the rule.[20] He was not convinced that there was a clear causal connection between the plaintiff's physical injuries and defendant's automobile striking her porch.[21] Furthermore, he believed that the damages were excessive since her medical bills totaled only $112, while her recovery was $12,000.[22]

While the *Hughes* ruling eliminated the necessity for a contemporaneous physical impact when "physical injuries" naturally result from fright or shock, impact is still a prerequisite where conduct is merely negligent and the resulting harm is emotional disturbance alone.[23] It becomes necessary to examine the requirement of "physical injury" to fully understand the

16. Hughes v. Moore, 214 Va. 27, 33, 197 S.E.2d 214, 219 (1973).

17. *Id.* at 34, 197 S.E.2d at 219. The court noted that, "[m]any eminent scholars have considered the rule and are virtually unanimous in condemning it as unjust and contrary to experience and logic." *Id.* at 33, 197 S.E.2d at 219. *See* McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHNS L. REV. 1, 31 (1949); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 197-98 (1944); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 274-79 (1921).

18. Schurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972). The majority opinion stated that they did not feel that *Schurk* was a proper case for reconsideration of the "impact rule" and that they would reconsider the rule in a proper case. *Id.* at 939-40.

19. Hughes v. Moore, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973). *See also* Comment, *Injuries from Fright Without Contact*, 15 CLEV.-MAR. L. REV. 331, 337 (1966).

20. Hughes v. Moore, 214 Va. 27, 36, 197 S.E.2d 214, 221 (1973).

21. *Id.* at 37, 197 S.E.2d at 221. Justice Harrison is apparently relying on the argument that damages unaccompanied by a physical impact can not be considered as a natural result of the negligent conduct.

22. *Id.* Justice Harrison is apparently relying on the argument that damages are too speculative in nature and will open the door to fictitious claims. The majority in *Hughes* addressed itself to the problem of damages in the following fashion:

> There is no fixed rule or standard by which damages can be measurd for mental and physical suffering. The amount to be awarded is largely a question for the jury to determine in view of the facts and circumstances of each particular case. Unless the amount of the award is so excessive as to shock the conscience of the court, and to create the impression that the jury was influenced by partiality or prejudice, the verdict of the jury will not be disturbed by us. *Id.* at 36, 197 S.E.2d at 220.

23. *Id.* at 34, 197 S.E.2d at 219:

> [W]here conduct is merely negligent, not wilful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone.

Hughes ruling. The plaintiff's condition was described as "anxiety reaction, with phobia and hysteria," which "presented a serious mental problem."[24] It is implicit from the facts and holding that "physical injuries" includes mental conditions. This appears to be in line with an earlier federal case applying Virginia law,[25] in which the court stated that "physical injury" is not to be interpreted in the usual sense. What is required is a suffering of greater substance than a pure isolated mental anguish, such as fright, anxiety, or apprehension,[26] which is generally trivial, of short duration and easily feigned.[27] This approach appears to be the prevailing one in other jurisdictions[28] and appears to be a requirement intended to provide the court with an objective standard by which the injury may be properly ascertained.[29]

As a result of the *Hughes* decision, Virginia now allows recovery for "physical injuries" naturally resulting from shock or fear proximately caused by negligent conduct, notwithstanding the absence of a contemporaneous physical impact. While recovery is not permitted for emotional disturbance alone without a contemporaneous physical impact, it is submitted that under the liberal interpretation of "physical injury" very few, if any, deserving cases will go without redress. Finally, the limitations imposed by the court seem to be based on foreseeability. The third party who witnesses negligent conduct resulting in injury to another exemplifies the "unforeseeable plaintiff"[30] and a fortiori when they are not a member of the immediate family. When the resulting harm would not have oc-

24. *Id.* at 29, 197 S.E.2d at 216.

25. Penick v. Mirro, 189 F. Supp. 947 (E.D. Va. 1960).

26. *Id.* at 949.

> "Physical damage" . . . has never been equated by the Virginia courts with physical taction. The term here connotes merely an injury upon or within the person of the claimant. Furthermore, the injury may be direct or indirect, mediate or immediate. But there must be a suffering of greater substance than a pure, isolated mental anguish, such as fright, anxiety or apprehensiveness.

27. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54, at 329 (4th ed. 1971).

28. *Accord*, Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906) (psychopathological conditions were properly regarded as "physical injury"); Bowman v. Williams, 164 Md. 397, 165 A. 182, 184 (1933) ("physical injuries" refers to an external condition or symptoms clearly indicating a resultant pathological, physiological, or mental state.); Gulf C. & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900) ("Traumatic Neurasthenia"; described as a serious nervous condition, was properly regarded as a "physical injury."); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (psychopathological conditions were properly regarded as "physical injury.")

29. Annot., 64 A.L.R.2d 100 (1959). For all practical purposes the question is not whether the consequence is physical, but is it objectively ascertainable? *Id.* at § 9(b) & n.7.

30. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

curred in a normal individual, it becomes an unforeseeable risk, thereby limiting the defendant's liability.[31]

J.H.H.

31. For an exhaustive survey of this area of the law see Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).